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Nos. 00-596, 597

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LORILLARD TOBACCO CO., ET AL.,

Petitioners,

v.

THOMAS F. REILLY,
ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

ALTADIS U.S.A. INC., ET AL.

Petitioners,

v.

THOMAS F. REILLY,
ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether state regulations that restrict the display of tobacco advertising near schools and playgrounds are pre-empted by the Federal Cigarette Labeling and Advertising Act ("Act"), where the regulations do not affect the federally mandated health warning on cigarette labeling or advertising and are well within the state police powers that Congress intended to preserve.

2. Whether a First Amendment challenge to state regulations that restrict the display of tobacco advertising near schools and playgrounds should be reviewed under the strict scrutiny standard applicable to content-based restrictions of noncommercial speech.

3. Whether the First Circuit correctly applied the fourth prong of the *Central Hudson* test to hold that the school and playground zones within which tobacco advertising is restricted are not more extensive than necessary to further the State's goal of reducing youth tobacco use.

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RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, the respondent Thomas F. Reilly, as Attorney General of Massachusetts, hereby submits this brief in opposition to the petition for a writ of certiorari.

OTHER CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED

In addition to the constitutional, statutory and regulatory provisions set forth in the Petition and its appendix, the following statutory provision is involved.

Section 2 of the Federal Cigarette Labeling and Advertising Act, as amended, 15 U.S.C. § 1331, provides:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby —
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

STATEMENT OF THE CASE

In an effort to reduce youth tobacco use, the Attorney General of Massachusetts proposed regulations in May 1998 to address various marketing practices that promote the illegal sale or distribution of tobacco products to minors. *See* Mass. Gen. Laws c. 270, § 6 (providing criminal penalties for sale of any tobacco product to persons under 18). After a public hearing and receipt of extensive written comments, the Attorney General promulgated final regulations on January 8, 1999, now codified at 940 Code Mass. Reg. §§ 21.00 and 22.00. App. 105a-126a.

The regulations impose affirmative requirements on retailers, such as the mandatory verification of the age of all tobacco purchasers appearing to be under 27, and prohibit retail practices known to facilitate minors' access to tobacco, such as the use of "self-service" tobacco product displays and the distribution of free samples. 940 C.M.R. §§ 21.04(1) and (2)(c). App. 109a-109a. The regulations also restrict tobacco advertising in locations near schools and playgrounds, where children will see it frequently and involuntarily. In particular, the regulations prohibit "[o]utdoor advertising, including advertising . . . from within a retail establishment that is directed toward or visible from the outside of the establishment" in any location that is within a 1,000 foot radius of any school or public playground. 940 C.M.R. § 21.04(5)(a). For retailers located in these areas, the regulations also prohibit interior tobacco advertising placed at children's eye level (*i.e.* lower than five feet from the floor). 940 C.M.R. §§ 21.04(5)(b). Retail outlets that do

not admit minors are exempt from the regulations' marketing and interior advertising restrictions. App. 113a-114a.[1]

The regulations were promulgated following the publication of findings by the U.S. Food and Drug Administration (FDA), the Surgeon General of the United States and the Institute of Medicine of the National Academy of Sciences that tobacco advertising influences minors to use tobacco products. First Circuit Joint Consolidated Appendix (hereafter "JCA") at 1203, 1224, 1330-1368, 1377, 1398, 1442, 1513, 1535, 1595, 1617.[2] In 1995, the U.S. Centers for Disease Control (CDC) recommended "eliminating or severely restricting all forms of tobacco product advertising and promotion to which young persons are likely to be exposed" as part of an overall approach to youth tobacco use. JCA 1643. Indeed, in 1990 the cigarette industry adopted a voluntary advertising code that prohibits cigarette advertising on bill-

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[1] The regulations also allowed a retailer, at its discretion, to "place one sign no larger than 576 square inches and containing only black text on a white background stating 'Tobacco Products Sold Here'" on the outside of, or visible from, the retail premises. 940 C.M.R. § 21.04(6). The district court held this so called "tombstone" provision preempted and the Attorney General did not appeal that ruling. App. 6a.

[2] In particular, the FDA concluded in 1996 that "cigarette and smokeless tobacco advertising has a powerful appeal to children and adolescents" and that "[tobacco] advertising plays a material role in the decision by those under 18 to use tobacco products." JCA 1513, 1519. These and other findings prompted the Agency to propose that tobacco advertising be restricted as part of governmental efforts to reduce youth tobacco use. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (1996). Although the Court subsequently held that the FDA lacks the statutory authority to regulate tobacco products, it relied on the Agency's findings in reaching that conclusion. *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291, 1302, 1305, 1315 (2000).

boards that are within 500 feet of any school or children's playground. JCA 805, 1398-1399.

Extent of Restrictions on Petitioners' Advertising

On November 23, 1998, Massachusetts entered into a multi-state agreement, known as the Master Settlement Agreement (or "MSA"), which resolved the States' litigation against the cigarette industry. Under the MSA, the petitioner cigarette companies are prohibited from displaying any outdoor advertising (including on billboards) or transit advertising. The MSA also prohibits advertising signs and placards in shopping malls, video arcades, arenas, and stadiums, whether or not the facility is open air or enclosed. Under the MSA, the sole exception to these outdoor advertising restrictions is the display of posters or placards, no larger than 14 square feet, at retail outlets selling cigarettes. JCA 469, 497-498. Consequently, to achieve compliance with the Massachusetts regulations, petitioners need only: (i) remove these exterior posters or placards from retail outlets within the school and playground zones, and (ii) insure that interior retail tobacco advertising is directed at adults (*i.e.* placed at least five feet above the floor).

Petitioners' repeated assertion that the regulations impose a "virtual ban" on tobacco advertising in Massachusetts is a significant overstatement. *See* Petition at 23, 26, 28. The regulations place no restrictions on petitioners' advertising in areas outside the school and playground zones, nor do they affect advertising in magazines, newspapers and other

media.[3] Instead, the regulations extend, incrementally, existing statutory, judicial and contractual restraints that are in place to reduce the exposure of children to tobacco advertising. The regulations do not prohibit advertising targeted to adults. The First Circuit specifically rejected petitioners' assertion that the regulations amount to a "blanket ban" on speech. App. 35a.

Even before the MSA was executed, the tobacco industry had long observed restrictions on its advertising. In 1969, Congress enacted a ban on cigarette advertising on television and radio, 15 U.S.C. § 1335,[4] and in 1986 extended this prohibition to smokeless tobacco advertising. 15 U.S.C. § 4402(f). One state, Utah, has entirely prohibited outdoor tobacco advertising since 1929. Utah Code 76-10-102 (1995 Replacement). As noted above, in 1990 the cigarette companies voluntarily eliminated billboard advertising within 500 feet of schools and playgrounds. After the companies implemented this policy, a number of states and localities enacted similar provisions. *See, e.g.*, App. 131a, citing Texas Health and Safety Code § 161.122 (prohibiting, with certain exceptions, tobacco advertisements within 1,000 feet of a church or school).

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[3] Petitioners' assertion that the advertising regulation "often covers as much as 90% of the populated areas in the jurisdiction" is also an overstatement. Petitioners base this assertion on a study — challenged below — which was limited to Massachusetts' three largest (and presumably most densely built) cities: Boston, Worcester and Springfield. App. 39a, 79a.

[4] This statute was upheld largely because "[s]ubstantial evidence showed that the most persuasive advertising was being conducted on radio and television, and that these broadcasts were particularly effective in reaching a very large audience of young people." *Capital Broadcasting Company v. Mitchell*, 333 F. Supp. 582, 585-586 (1971), *summarily aff'd* 405 U.S. 1000 (1972).

Prior Proceedings and Decisions

On May 21, 1999, petitioner cigarette manufacturers filed this action in the United States District Court for the District of Massachusetts. These companies claimed preemption under the Federal Cigarette Labeling and Advertising Act ("FCLAA" or "Act"), 15 U.S.C. §§ 1334(b), of both the regulations' restrictions on tobacco advertising and the regulations' bans on free product giveaways and the sale of tobacco products through the mail without age verification. App 48a-49a. Petitioners also claimed that the advertising restrictions and the prohibition of self-service tobacco displays violate the First Amendment. JCA 17-93. Shortly thereafter, the petitioner smokeless tobacco and cigar companies filed similar actions in the same court.

On December 2, 1999, the district court (Young, C.J.) granted summary judgment for the Attorney General on petitioners' preemption claim. App. 46a, 59a-60a. The district court identified the decisive issue as whether the challenged regulations constitute a requirement or prohibition "based on smoking and health," as that phrase is used in the FCLAA's preemption clause, Section 1334(b). App. 51a. The court found it significant that Congress expressly stated its purpose with respect to preemption — to prevent nonuniform cigarette labeling and advertising regulations "with respect to any *relationship between smoking and health*." App. 54a, quoting 15 U.S.C. § 1331 (emphasis in opinion). The court found that the Massachusetts advertising regulations "do not implicate the relationship between smoking and health. Rather, they 'simply restrict the location of cigarette-advertising signs, irrespective of the nature of the message communicated.'" App. at 56a, quoting *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore,* 63 F.3d 1318, 1324 (4th Cir. 1995).

The district court also granted, in substantial part, the Attorney General's motion for summary judgment on petitioners' claims under the First Amendment. App. 104a. Applying the test for review of commercial speech regulations set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980), the court concluded that "the Attorney General has provided substantial evidence showing that regulation of tobacco advertising would substantially advance its interest in curtailing underage smoking." App. 75a. The district court found, with respect to the outdoor advertising regulation, that the defined school and playground zones were sufficiently narrowly tailored, but held that the Attorney General had not supported his view that minors would also more frequently enter retail stores within the 1,000 foot zones, and so held this latter provision invalid. App. 78a-83a.

The First Circuit affirmed the district court's decision with respect to preemption. Relying on recent decisions of the Second and Seventh Circuits, the court rejected petitioners' argument that the FCLAA preempts all state regulations "with respect to [tobacco] advertising." App. 9a-12a. Considering the FCLAA's preemption clause and its express statement of purpose, the court concluded "that Congress sought to inform the public of the health risks associated with smoking, and . . . to protect the national economy from the burdens that would result from a multitude of 'diverse, nonuniform, and confusing' advertising standards." App. 10a, quoting *Greater N.Y. Metro. Food Council v. Giuliani*, 195 F.3d 100, 106 (2nd Cir. 1999). The court found that Massachusetts' location-based restriction "do[es] not touch upon Congress's 'comprehensive Federal program' to control cigarette advertising information." *Id.* Although the court recognized that states and municipalities might impose differing regulations with regard to the location of tobacco advertising, it concluded that these were "not the kind of 'diverse, nonuniform, and confusing' advertising standards with

which Congress was concerned when it enacted the FCLAA." App 13a, citing 15 U.S.C. § 1331.

The First Circuit also upheld the advertising regulations under the First Amendment. Applying the *Central Hudson* test, the court found "that the Attorney General has offered sufficient product-specific evidence regarding cigarettes, smokeless tobacco, and cigars to demonstrate that the dangers posed by underage use of each is a 'real harm' and that the regulations can be reasonably expected to alleviate those harms to a material degree." App. 21a. The court concluded that the advertising restrictions would reduce the visibility of tobacco products to minors and eliminate "the psychological incentives to tobacco use presented by things as simple as attractive ad color and design," which the court agreed "may reasonably be assumed to have a greater effect on young people." App. 28a-29a. Under *Central Hudson*'s final prong, the court found the regulations sufficiently narrowly tailored because of their "obvious connection to the state's interest in protecting minors, which is served directly by limiting application of the regulations to areas near schools and playgrounds — areas where children are more likely to be." App. 30a.

REASONS FOR DENYING THE WRIT

I. THE PREEMPTION CLAIM DOES NOT MERIT PLENARY REVIEW.

A. The FCLAA Preemption Question is of Limited Importance and the Lower Courts, with a Single Exception, Have Consistently and Correctly Applied the Holding of *Cipollone v. Liggett Group, Inc.*

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), this Court considered the proper construction of the express preemption provision of the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1334(b). Petitioners now ask the Court to address the same statutory provision, in a case of dramatically less consequence than *Cipollone* on an issue as to which the lower courts are in agreement, save one contrary decision. *Cipollone* clearly provides the lower courts the necessary guidance for determining the preemptive reach of Section 1334(b) and obviates any need for the Court to accept this case to address FCLAA preemption.

In *Cipollone*, the Court considered whether, and to what extent, Section 1334(b) preempted common law claims for damages asserted by Rose Cipollone's estate against several cigarette manufacturers as a result of her death from lung cancer. 505 U.S. at 508. The issue was of manifest importance as it affected the rights of millions of people with smoking-related diseases who might bring state law claims against the cigarette companies. In the present case, the preemption issue has no similar importance to the administration of justice. The advertising restrictions in the MSA have, as practical matter, narrowed petitioners' obligations under the regulations to removal of certain small format retail advertising near schools and playgrounds. And, because al-

most all point-of-sale cigarette advertising is by the four cigarette petitioners here, the preemption issue affects, almost exclusively, only the parties before the Court. A decision on the unique question of FCLAA preemption would be of no importance to manufacturers or advertisers of other products.

To date, seven decisions of the courts of appeals have considered questions of preemption under Section 1334(b). Of these, six represent a consistent application of this provision under the framework set forth in *Cipollone*. In addition to the First Circuit, the Second, Fourth and Seventh Circuits have all held that state or local laws that regulate the location, but not the content, of cigarette advertising are not preempted under the FCLAA. In each case, the court of appeals found no indication that Congress intended, absent state or local interference with the uniform warning message mandated in the FCLAA, to frustrate the States' ability to protect the health and safety of their citizens and to regulate, as they historically have done, the location of commercial outdoor advertising. App. 9a-13a. *See Greater N.Y. Metro. Food Council,* 195 F.3d 100, 109 (2nd Cir. 1999) *cert. denied* 120 S.Ct. 1671 (2000); *Federation of Advertising Industry Representatives ("F.A.I.R.") v. City of Chicago*, 189 F.3d 633, 639 (7th Cir. 1999) *cert. denied* 120 S.Ct. 1671 (2000); *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore,* 63 F.3d 1318, 1324 (4th Cir. 1995) *vacated and remanded on other grounds*, 518 U.S. 1030, *modified by* 101 F.3d 332 (4th Cir. 1996) *cert. denied* 520 U.S. 1204 (1997). Two other decisions represent a consistent application of Section 1334(b) in different circumstances. *Vango Media, Inc. v. City of New York*, 34 F.3d 68, 73-75 (2nd Cir. 1994) (holding that FCLAA preempts City ordinance that affects content of health message by requiring companies displaying advertising on New York taxis to carry one anti-smoking message for every four cigarette advertisements displayed); *Philip Morris, Inc. v. Harshbarger*, 122 F.3d 58, 76 (1st Cir.

1997) (holding that state law mandating disclosure of tobacco additives to state public health agency was not "with respect to advertising" and therefore not preempted by FCLAA).

Only the opinion of the Ninth Circuit in *Lindsey v. Tacoma-Pierce County Health Dept.*, 195 F.3d 1065 (9th Cir. 1999), amended at 203 F.3d 1150, represents a departure. In *Lindsey,* however, the Ninth Circuit engaged in only a brief discussion of Section 1334(b), noting that the County did not "contend that the plain language of the FCLAA fails to preempt its ban on outdoor tobacco advertisements." *Id.* at 1070. The court otherwise found no distinction, for preemption purposes, between local restrictions on the location of cigarette advertising and regulations that interfere with the advertising and labeling requirements of the Act. *Id.* at 1072. Consequently, the court held the County's outdoor advertising restrictions preempted. This single aberration does not present a conflict that warrants review. *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955) (conflict in lower courts does not justify review unless "real and embarrassing").[5]

The fact that a number of states and localities have enacted restrictions on advertising similar in principle to the cigarette companies' voluntary code does not suggest that review is warranted. Contrary to petitioners' assertion, these states and localities were not "encouraged" to act by a conflict in judicial authority, Petition 18, as almost all of these laws predate the 1999 decision in *Lindsey*. App. 128a-134a.

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[5] The Court has denied certiorari in two of the FCLAA cases where review was sought after publication of the Ninth Circuit's decision in *Lindsey*. *See Greater N.Y. Metro. Food Council v. Giuliani,* 195 F.3d 100 (2nd Cir. 1999) *cert. denied* 120 S.Ct. 1671 (2000); *Federation of Advertising Industry Representatives v. City of Chicago*, 189 F.3d 633 (7th Cir. 1999) *cert. denied* 120 S.Ct. 1671 (2000).

As explained below, there is no indication in the Act that Congress saw local laws restricting the placement of cigarette advertising as interfering with its objectives; indeed, such restrictions are entirely consistent with the Act's public health goals and with its ban on cigarette advertising on television and radio, also intended to protect children. 15 U.S.C. §§ 1331, 1333, 1335.

B. The First Circuit Correctly Held That a State Restriction on the Location of Cigarette Advertising Is Not Preempted by the FCLAA.

The petitioners' contention that the FCLAA preempts all state and local laws "with respect to" cigarette advertising was correctly rejected by First Circuit and does not merit review by this Court. There is no evidence in the Act that Congress intended to give cigarette manufacturers a special immunity — one not afforded to manufacturers of other consumer products — from state and local laws regulating the location of commercial advertising. Rather, Congress' objective was to provide a uniform health warning to the public about the dangers of cigarette use and, at the same time, to avoid a burden to national advertisers that would result from state or local laws that require different or additional health messages. 15 U.S. C. § 1331. The First Circuit correctly concluded that Massachusetts' restriction of the permissible locations for cigarette advertising, which does not affect the content of such advertising, is not preempted under Section 1334(b).

In *Cipollone*, the Court established a framework for consideration of preemption questions arising under Section 1334(b). That provision states:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

15 U.S.C. § 1334(b). Because Congress included a "provision defining the pre-emptive reach" of the FCLAA, the Court found its task was to "identify the domain expressly pre-empted by [Section 1334(b)]." 505 U.S. at 517. The Court emphasized that its analysis must "'start[] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Id.* at 516 (majority), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Consequently, the Court construed the text of Section 1334(b) narrowly to avoid unwarranted intrusion on the State's sovereign authority. *Id.* at 518 (majority); *see also id.* at 524 (plurality) (construction of Section 1334(b) must be "fair but narrow"); 532 (Blackmun, J., concurring in part and dissenting in part) (Court cannot find preemption "in the absence of clear and unambiguous evidence that Congress intended that result"). In determining the preemptive reach of Section 1334(b), *Cipollone* also considered the structure and purpose of the FCLAA as a whole, and its legislative history. *Id.* at 518-19 (majority), 528-529 (plurality), 534, 539-41 (Blackmun, J., concurring in part and dissenting in part).

The "domain" preempted by Section 1334(b) becomes evident when that provision is viewed against the structure and purpose of the Act. *See Cipollone,* 505 U.S. at 529 (considering purpose of 1969 Act in construing "smoking and health" clause). In Section 1331, Congress declared as its purpose "[t]o establish a comprehensive Federal program to deal with cigarette labeling and advertising *with respect to any relationship between smoking and health.*" (emphasis added). In the same section, Congress articulated two specific purposes. In furtherance of its first purpose, to adequately inform the public "about any adverse health effects of cigarette smoking," the Act makes it unlawful to sell or advertise cigarettes without specific warning labels set forth in a specific format. 15 U.S.C. §§ 1331, 1333.[6] To further its second purpose, to protect the national economy from the burden of nonuniform state or local advertising regulations "with respect to any relationship between smoking and health," Congress included the express preemption provision in the Act. 15 U.S.C. §§ 1331. *See Cipollone,* 505 U.S. at 514.

Section 1334(b) thus preempts state or local advertising regulations that require, or prohibit, smoking-and-health information on cigarette packages or with respect to cigarette advertising. *See, e.g., Vango Media, Inc.*, 34 F.3d at 74-75 (holding city ordinance preempted under Section 1334(b) that required certain advertisers to display one city-approved anti-smoking message for every four cigarette advertisements.). Congress sought to preempt such regulations, which implicate the "relationship between smoking and

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[6] Congress also prohibited the advertising of cigarettes and little cigars on television and radio in order to limit the exposure of young people to these promotions. 15 U.S.C. § 1335. The Act also establishes procedures for federal agencies and Congress to gather information, for purposes of possible legislative action, on the health consequences of smoking and on cigarette advertising practices and methods. 15 U.S.C. § 1337.

health" and interfere with the Act's uniform health warning. 15 U.S.C. §§ 1331.[7]

The Massachusetts regulations do not obstruct the FCLAA goal of a uniform national health warning on cigarette packages and advertising. In restricting the display of tobacco advertising near schools and playgrounds, the regulations do not prescribe or affect the content of cigarette advertising. Compliance will not require cigarette manufacturers to alter, or create, any advertising copy or modify any national or regional advertising campaign. As such, the regulations are entirely consistent with the purpose of the FCLAA to protect the national economy from the burden of "diverse, nonuniform" state and local cigarette advertising regulations "with respect to any relationship between smoking and health." 15 U.S.C. § 1331. Moreover, because Congress was clearly concerned with advertising directed to children, *see* 15 U.S. C. § 1335 (banning TV and radio advertising), it would contradict the Act's purpose to guarantee cigarette advertisers the right to advertise in areas children gather each day.

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[7] Similarly, in *Cipollone* the plurality held preempted only those common law claims *directly* implicating the health related content of cigarette advertising. *Compare Cipollone*, 505 U.S. at 524 (holding that Section 1334(b) preempted common law failure-to-warn claims to the extent such claims were predicated on a legal obligation to provide "additional, or more clearly stated, warnings") with *id.* at 528-29 (holding that state common law claim for fraudulent misrepresentation was not preempted because it did not depend on a requirement of specific health warnings, but instead was predicated on a requirement that advertising not be deceptive).

The plain language of the FCLAA refutes petitioners' contention that the Act preempts *any* regulation of cigarette advertising by the States. *See* Petition at 15, 17, 18.[8] Rather, Congress targeted a specific area of regulation — advertising requirements or prohibitions "based on smoking and health" — as off-limits to the States. 15 U.S.C. § 1334(b).[9] Petitioners ignore this express limitation on the reach of Section 1334(b). *See Cipollone,* 505 U.S. at 524 (plurality) ("... each phrase within [Section 1334(b)] limits the universe of common law claims pre-empted by the statute."). The petitioners' suggestion at page 16, n. 8, that "facially tobacco-specific" regulations are inevitably "based on smoking and health," reduces that critical phrase in Section 1334(b) to mere surplusage. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992) ("[C]ourts should disfavor interpretations of statutes that render language superfluous.").[10] Petitioners' unrestrained view of the preemptive reach of Section 1334(b) has correctly been rejected by the First, Second, Fourth and Seventh Circuits and does not merit consideration by this Court. *See, e.g., Greater N.Y.*

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[8] *See* Petition at 15 ("In 1969, however, the preemption provision was completely rewritten, so that it now reaches beyond regulation of the content of advertising to any regulation 'with respect to' advertising.").

[9] The Senate Report accompanying the 1969 amendments to the Act emphasized this focus. "The State preemption of regulation or prohibition with respect to cigarette advertising is narrowly phrased to preempt only State action based on smoking and health." Senate Rep. No. 91-566, at 12 (1969), *reprinted in* 1970 U.S.C.A.A.N. 2652, 2663.

[10] By its plain language, Section 1334(b) preempts only a *subset* of "tobacco specific" regulations — those "based on smoking and health." *See Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 488 (1996) (discussion of FCLAA preemption provision). If, as petitioners argue, the provision preempted *all* "facially tobacco specific regulations" it would simply state: "No requirement or prohibition shall be imposed under state law with respect to the advertising or promotion of [properly labeled] cigarettes."

Metro. Food Council, 195 F.3d at 105 (plaintiffs' view of Section 1334(b) could "preempt every conceivable obligation having a relationship — however evanescent -- to the advertising and promotion of cigarettes"); *F.A.I.R. v. City of Chicago*, 189 F.3d at 638 (plaintiffs' view of preemption could prevent states and municipalities from restricting distribution of free cigarette samples).

Petitioners' expansive approach to FCLAA preemption would result in a broad incursion on the States' police powers. The legislative history of Section 1334(b) makes clear, however, that Congress intended precisely the opposite. "The Senate Report emphasized that [Section 1334(b)] . . . would in no way affect the power of any State . . . with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or *similar police regulations*." *Cipollone*, 505 U.S. at 529, n. 26 (plurality) (quoting Senate Report No. 91-566, p. 12 (1969)(emphasis in original). *See also id.* at 529-530, n. 27 (FCLAA legislative history "plainly expresses an intent to preserve the 'police regulations' of the States."). This Court long ago recognized that regulation of the location of cigarette advertising is well within the police power. *See Packer Corp. v. State of Utah*, 285 U.S. 105, 108 (1932) (upholding Utah ban on outdoor tobacco advertising). Because the Act does not disclose a "clear and manifest" Congressional purpose to preempt the States' sovereign authority in this area, the First Circuit correctly followed the rule established by the Second, Fourth and Seventh Circuits and held that the Massachusetts advertising regulations are not preempted. App. 11a.

In *Lindsey*, on the other hand, the Ninth Circuit erred in concluding that Congress granted cigarette advertisers blanket protection from the "burden . . . to consult local regulations concerning the placement of tobacco advertisements" in areas they wish to advertise. 195 F.3d at 1072. The *Lindsey* court nowhere tempered its broad literal reading of

Section 1334(b) against the presumption against preemption of state law and, as a result, ultimately failed to follow *Cipollone*'s mandate to give Section 1334(b) a fair but narrow reading. 505 U.S. at 524. In particular, the court gave the phrase "based on smoking and health" from Section 1334(b) its broadest possible meaning — finding it applicable where the local law "pertains to matters of health and safety of the citizens of Pierce County." 195 F.3d at 1070.[11] That broad construction virtually guarantees that the Act will significantly impair a State's exercise of its police regulations, a result that Congress certainly sought to avoid. *See Cipollone*, 505 U.S. at 529, n. 26, 529-530, n. 27.

II. THIS CASE PRESENTS NO OCCASION TO ADOPT A NEW ANALYSIS FOR REVIEW OF LIMITED RESTRICTIONS ON COMMERCIAL SPEECH.

Both the district court and the First Circuit held that the Massachusetts regulations satisfy the intermediate scrutiny test established in *Central Hudson Gas & Elec. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980), for review of

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[11] *Lindsey* also erred in concluding that the 1969 amendments to the Act supported preemption of the County's advertising regulation. 195 F.3d at 1073-74. The *Cipollone* plurality emphasized that, although the Act's preemption language was amended in other respects in 1969, Congress retained the important "smoking and health" limitation it had originally included in the clause. *Cipollone*, 505 U.S. at 529 (plurality) ("[T]he phrase 'relating to smoking and health' * * * was essentially unchanged by the 1969 Act * * *."); *see also id.* at 539-42. As a result, the 1969 Act continued to preempt only state law requirements or prohibitions concerning the health-related content of cigarette advertising. *Cf. id.* at 519-20 (1965 Act "only pre-empted state and federal rulemaking bodies from mandating particular cautionary statements * * *.").

restrictions on commercial speech.[12] App. 14a-37a; 64a-88a. In so ruling, the First Circuit was in accord with the Fourth Circuit, which earlier upheld under the First Amendment a Baltimore ordinance prohibiting outdoor tobacco advertising in certain parts of that city. *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore,* 63 F.3d 1318, 1325-26 (4th Cir. 1995) *vacated and remanded,* 518 U.S. 1030, *modified by* 101 F.3d 332 (4th Cir. 1996) *cert. denied* 520 U.S. 1204 (1997).[13] These are the only circuits that have reviewed such restrictions under the First Amendment. Consequently, there is no division of authority among the courts of appeal on this issue and petitioners otherwise fail to identify adequate reasons for the Court to review the First Amendment question.

Because petitioners' challenge failed under the well established *Central Hudson* test, they now ask the Court to review the regulations under a strict scrutiny standard deriving from the Court's precedent concerning political and other "core"

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[12] That test first inquires whether the speech at issue concerns a lawful activity and is not misleading; if not, it has no First Amendment protection. *Central Hudson*, 447 U.S. at 566. The government may regulate non-misleading commercial speech concerning a lawful activity where (i) the asserted governmental interest in regulating the speech is substantial, (ii) the regulation directly advances the governmental interest asserted, and (iii) the regulation is not more extensive than necessary to serve that interest. *Id. See, e.g., Greater New Orleans Broadcasting Ass'n., Inc. v. United States,* 527 U.S. 173, 183-196 (1999) (applying *Central Hudson* test).

[13] After the Fourth Circuit's first opinion in *Penn Advertising*, this Court vacated the judgment and remanded the case for further consideration in light of *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996). 518 U.S. 1030. On remand, the Fourth Circuit modified, but readopted, its prior decision upholding the ordinance under the First Amendment. 101 F.3d 332. The Court thereafter denied the advertisers' petition for writ of certiorari. 520 U.S. 1204 (1997).

speech.[14] This case would, however, present precisely the wrong vehicle for reconsideration of the *Central Hudson* test. Nothing in the Court's cases suggests a need for heightened review where, in the interest of protecting children, the government has imposed a targeted restriction on commercial speech that leaves ample room for advertising to adults. Indeed, the government has more latitude to regulate even noncommercial speech where its purpose is to protect children from particular risks associated with it. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996) (plurality) (protection of children an "extremely important justification" for speech restriction).[15] Because *Central Hudson* provided an appropriate basis for the decision in this case, the Court should not "reach out to make novel or unnecessarily broad pronouncements on constitutional issues." *Greater New Orleans Broadcasting Assn., Inc.*, 527 U.S. at 184.

In urging a strict scrutiny standard, petitioners propose a significant and unwarranted alteration in the Court's First Amendment jurisprudence. They ignore the "'common-sense' distinction between speech proposing a commercial

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[14] Petitioners do not dispute that the regulations are applicable only to "commercial" speech. *See Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (describing commercial speech as "speech which does no more than propose a commercial transaction."). The regulations restrict only "advertising," which is defined as "any oral, written, graphic, or pictorial statement . . . the purpose or effect of which is to promote the use or sale of the [tobacco] product." App. 107a (940 Code Mass. Reg. § 21.03).

[15] In addition, petitioners' proposal would, among other things, require the lower courts to revisit long settled restraints on the advertising of tobacco products to children. *See* 15 U.S.C. § 1335 (prohibiting television and radio advertising of cigarettes), upheld in *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 585-586 (D.D.C. 1971), *summarily aff'd* 405 U.S. 1000 (1972).

transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 64 (1983), quoting *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 455-456 (1978). As the Court stated in *Ohralik*:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

436 U.S. at 456. *See also Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) ("We have always been careful to distinguish commercial speech from speech at the First Amendment's core."); *R.A.V. v. St. Paul*, 505 U.S. 377, 415 (1992) (Blackmun, J., concurring in judgment) ("If all expressive activity must be accorded the same protection, that protection will be scant. The simple reality is that the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech.").

Moreover, the specific arguments set forth in the Petition fail to raise a substantial issue concerning the First Amendment standard of review applicable here. The fact that the regulations concern only *tobacco* advertising, as opposed to advertising for other products, does not subject them to stricter First Amendment scrutiny under doctrines applicable

to "content" or "viewpoint" based regulation of noncommercial speech. In addition, as set forth below, the Massachusetts regulations implicate none of the particular concerns that some Justices have expressed in criticizing the limits of the *Central Hudson* test. This case therefore presents no issue under the First Amendment that warrants review.

A. The Regulations Implicate None of the Concerns That Have Prompted Criticism of the *Central Hudson* Test.

In a number of cases, the Court or individual Justices have expressed the concern that certain commercial speech restrictions call for either an exacting application of the *Central Hudson* test or more heightened review. The Massachusetts regulations do not, however, give rise to these concerns. Rather, such concerns are addressed to commercial speech restrictions that are directed at legitimate adult purchasers, are promulgated in the absence of direct regulation of the commercial conduct, and act as a total ban on speech.[16]

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[16] For example, in *Virginia Pharmacy Board* the Court criticized the State's "highly paternalistic approach" in forbidding the advertising of prescription drug prices and admonished that the State cannot "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." 425 U.S. at 770-773. In *Central Hudson*, the Court noted that it would "review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy . . . where a ban on speech could screen from public view the underlying governmental policy." 447 U.S. at 566 n.9. In his concurrence, Justice Blackmun challenged the application of the Court's new test "when a State seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly." 447 U.S. at 573.

More recently, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), Justice Stevens (joined by Justices Kennedy and Ginsburg) stated

Consequently, this case presents no occasion to reconsider the *Central Hudson* test.

The regulations plainly are not directed at dampening the demand for tobacco products among *legitimate* purchasers. The purpose of the regulations is to "address the incidence of cigarette smoking and smokeless tobacco use by children under legal age." App. 105a (940 Code Mass. Reg. § 21.01). The advertising restrictions achieve that goal by targeting themselves to areas near schools and playgrounds. The First Circuit correctly recognized that the regulations do not suggest the kind of paternalistic manipulation of adult consumer behavior criticized in this Court's cases. App. 18a-19a.

Moreover, the regulations support previously enacted legislation prohibiting the sale of tobacco to minors. Mass. G.L. c. 270, § 6. It is, in fact, the extensive advertising of tobacco products near schools and playgrounds that undermines the Commonwealth's policy against tobacco sales to minors. *Cf. U.S. v. Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993) ("Congress clearly was entitled to determine that broadcast of promotional advertising of lotteries undermines North Carolina's policy against gambling.").

Finally, in the cases upon which petitioners rely, the Court's concern was directed at laws that imposed a blanket prohibition on speech. *See, e.g., 44 Liquormart, Inc.*, 517

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that "the First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *Id.* at 503. He went on to state that "a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes." *Id.* at 510. In his concurring opinion, Justice Thomas stated: "In cases . . . in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in *Central Hudson* []should not be applied . . . ." *Id.* at 518.

U.S. at 504 ("[T]here is no question that Rhode Island's price advertising ban constitutes a blanket prohibition" against speech.); *Central Hudson*, 447 U.S. at 558 (regulation "completely bans promotional advertising by an electrical utility"); *Virginia Pharmacy Bd.*, 425 U.S. at 752 (ban on advertising prices for prescription drugs). In this case, the First Circuit specifically rejected petitioners' contention that the regulations are a "blanket ban" on speech. App. 35a. Under the regulations, petitioners remain free to advertise tobacco products in areas outside the school and playground zones, and in magazines, newspapers and other media. Petitioners may also advertise inside retail outlets, in *any* location, by placing the advertising above children's eye-level (i.e. five feet). Consequently, the regulations do not invite further review.

B. The Fact that the Regulations Are Limited to Tobacco Products Does Not Subject Them to Strict Scrutiny Under Doctrines Applicable to Content Based Regulation of Noncommercial Speech.

As discussed above, the regulations do not require or prohibit any particular advertising content; rather, they simply restrict the display of tobacco advertising in certain locations where children gather. The regulations are limited to *tobacco* advertising, but for entirely permissible reasons. Such advertising promotes an addictive product with serious adverse health consequences which is illegal for sale to minors. Petitioners have shown no basis for strict scrutiny review.

Although "[i]in most other contexts, the First Amendment prohibits regulation based on the content of the message," the same is not true with respect to commercial speech. *Central Hudson*, 447 U.S. at 564 n.6. As the First Circuit noted, this Court "has made clear that even regulations which single

out the promotional speech of a particular industry are analyzed under the *Central Hudson* test." App. 14a-15a, citing *Greater New Orleans Broadcasting Ass'n*, 527 U.S. at 184 (applying *Central Hudson* to regulations restricting advertisements for casino gambling). In the realm of commercial speech, the government may have constitutionally legitimate reasons to regulate advertising with respect to one product or service, without applying the same restriction to other commercial dealings. *R.A.V.*, 505 U.S. at 388-389. "It is . . . beyond question that the Government may choose to limit advertisements for cigarettes, *see* 15 U.S.C. §§ 1331-1340, but not for cigars; choose to regulate airline advertising, but not bus advertising; or choose to monitor solicitation by lawyers, but not by doctors." *Id.* at 422 (Stevens, J., concurring) (citations omitted). In this case, the regulations restrict tobacco advertising directed to minors, who cannot legally purchase tobacco products. This is an entirely permissible distinction under the First Amendment.[17]

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[17] There is also no merit to the petitioners' suggestion that strict scrutiny is necessary because the regulations are "viewpoint-based." Petition at 24. As the First Circuit stated: "On their face, the regulations restrict the promotion of tobacco products, regardless of brand or manufacturer, and permit nonpromotional speech relating to tobacco products by any speaker, tobacco manufacturers and sellers included. The companies make no allegation that the Attorney General has disparately, much less discriminatorily, applied these provisions. Under these circumstances, we do not see the danger of viewpoint discrimination . . . ." App. 15a-16a.

III. PETITIONERS' CHALLENGE TO THE GEOGRAPHIC PARAMETERS OF THE REGULATIONS RAISES ONLY A FACT-SPECIFIC QUESTION CONCERNING APPLICATION OF THE *CENTRAL HUDSON* TEST, AND THEREFORE PRESENTS NO BASIS FOR REVIEW.

Petitioners also ask the Court to review the First Circuit's application of the fourth prong of the *Central Hudson* test. Petition 26-29. Petitioners argue that, in restricting advertising to a distance of 1,000 feet from schools and playgrounds, the regulation is "more extensive than is necessary" to serve the State's concededly substantial interest in reducing youth tobacco use. *See Central Hudson*, 447 U.S. at 556 (quoting fourth prong of test). This assertion, that the First Circuit has incorrectly applied a properly stated rule of law, is not a basis for Supreme Court review. *See*-United States Supreme Court Rule 10.

Moreover, the fourth prong of the *Central Hudson* test accords the State the necessary leeway to draw lines. When the State frames a commercial speech regulation to address its substantial interest, the First Amendment demands "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served. [* * *] Within those bounds we leave it to the governmental decision makers to judge what manner of regulation may best be employed." *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989) (internal citations and quotation marks omitted). The industry's voluntary advertising code already recognizes the propriety of a 500 foot "buffer" zone around schools and playgrounds. JCA 805, 1398-1399. Petitioners' complaint that the Attorney General, in enlarging this zone, has drawn the line in the wrong place, asks for unwarranted judicial second-guessing. *Fox*, 492 U.S. at 480-

481 (fourth prong analysis "take[s] account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide[s] the Legislative and Executive Branches needed leeway . . . .").

Nor can petitioners legitimately argue that the regulations are overbroad because they incidentally reduce the amount of tobacco advertising to which adults are exposed in the school and playground zones. *See Greater New Orleans Broadcasting Ass'n.*, 527 U.S. at 194 (government may "incidentally, even deliberately, restrict a certain amount of [commercial] speech not thought to contribute significantly to the dangers with which the Government is concerned," if it does so in order to achieve a broader, legitimate objective). The protection of children is an "extremely important interest" that can justify restrictions on speech, even where adults are also affected to some degree. *Denver Area Educ. Tel. Consortium, Inc.*, 518 U.S. at 743; *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-751 (1978).[18] The Massachusetts regulations are appropriately targeted, restricting advertising that children will involuntarily confront as they go to and from school or the park. *See Packer Corp.*, 285 U.S. at 110

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[18] The analysis of tobacco advertising is entirely different than that undertaken in *Carey v. Population Services International*, 431 U.S. 678 (1977), and *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). In *Carey*, the Court held invalid a New York law that prohibited all contraceptive advertising, noting that such advertising "state[s] the availability of products and services that are not only entirely legal, but *constitutionally protected*." 431 U.S. 701 (emphasis added, citations omitted). Similarly, in *Bolger* the Court struck down a ban on unsolicited direct-mail advertising of contraceptives because the advertising related to activity "protected from unwarranted state interference" and because unwanted mailings could simply be deposited, unopened, in the trash. 463 U.S. at 69, 72. Tobacco products do not, of course, have the constitutional protection the Court has accorded contraceptives under its privacy cases.

(Justice Brandeis noting, with respect to Utah's restriction of outdoor tobacco advertising, that "[t]he young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce."); *cf. Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 127-128 (1989) (holding ban on "dial-a-porn" invalid and contrasting private telephone communications with "public displays . . . which the recipient has no meaningful opportunity to avoid"). As such, the regulations clearly meet *Central Hudson*'s fourth prong requirement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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